



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 14, 2003

Mr. Monty Waters
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR2003-1766

Dear Mr. Waters:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177916.

The Texas Department of Health (the "department") received a request for "a complete copy of [the department's] investigation concerning Incident No. 2424-01-01-005[.]" You claim that the requested information is excepted from disclosure under section 552.101. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

We first address the requestor's assertion that the department "has provided no basis whatsoever for withholding its underlying investigation as confidential while the same information has previously been produced in the form of its report." Even if the department did previously release a portion of the submitted information, the department could not waive the confidential nature of the information. *See* Gov't Code § 552.007 (governmental body may not voluntarily release information if disclosure is prohibited by law or information is confidential under law); Open Records Decision No. 400 (1983). Accordingly, we will address the department's section 552.101 arguments with respect to the submitted information.

We next address your acknowledgment that the department has not sought an open records decision from this office within the ten business day time period prescribed by section 552.301 of the Government Code. *See* Gov't Code § 552.301(b). When a governmental body fails to comply with the procedural requirements of section 552.301, the information at issue is presumed public. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *City of Houston v. Houston*

Chronicle Publ'g Co., 673 S.W.2d 316, 323 (Tex. App.—Houston [1st Dist.] 1984, no writ); Open Records Decision No. 319 (1982). To overcome this presumption, the governmental body must show a compelling interest to withhold the information. See Gov't Code § 552.302; *Hancock*, 797 S.W.2d at 381. Normally, a compelling interest is that some other source of law makes the information confidential or that third party interests are at stake. Open Records Decision No. 150 at 2 (1977). As section 552.101 can provide a compelling reason to overcome the presumption of openness, we will address the department's arguments under that exception. See Open Records Decision No. 150 (1976).

First, however, we note that some of the requested records are subject to the Medical Practices Act (the "MPA"), subtitle B of Title 3 of the Occupations Code. The MPA governs access to medical records and provides in relevant part:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter . . . may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

The MPA requires that any subsequent release of medical records be consistent with the purposes for which a governmental body obtained the records. Occupations Code § 159.002(c); .005(e). Open Records Decision No. 565 at 7 (1990). Thus, the MPA governs access to medical records. Open Records Decision No. 598 (1991). The MPA provides for access to medical records in certain circumstances. See *id.* §§ 159.003, .004, .005. Thus, the department must release the medical records in accordance with the MPA. See Open Records Decision No. 598 (1991). We have marked the records that are subject to the MPA.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. You indicate that the submitted information is excepted in its entirety under section 161.0213 of the Health and Safety Code. Section 161.0213 provides as follows:

Reports, records, and information furnished to the commissioner or the commissioner's designee or the Texas Natural Resource Conservation Commission that relate to an epidemiologic or toxicologic investigation of human illnesses or conditions and of environmental exposures that are harmful or believed to be harmful to the public health are not public information under Chapter 552, Government Code, and are subject to the same confidentiality requirements as described by Section 81.046.

You state that the information was either furnished to the department or gathered or created by the department and that it relates “to an epidemiologic or toxicologic investigation of human illnesses and conditions, or environmental exposures that are harmful or believed to be harmful[.]” See Health & Safety Code § 161.0211 (providing that department shall conduct epidemiologic or toxicologic investigations of illnesses or conditions and of environmental exposures believed to be harmful to public health). Based on these representations and our review of the submitted information, we determine that the department must withhold the submitted information under section 552.101 of the Government Code in conjunction with section 161.0213 of the Health and Safety Code. As our ruling is dispositive, we need not address your arguments under section 81.046 of the Health and Safety Code.

In summary, information that is subject to the MPA may be released only in accordance with that act. The remaining information must be withheld under section 552.101 in conjunction with section 161.0213 of the Health and Safety Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

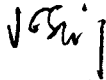
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body’s intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general’s Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 177916

Enc: Submitted documents

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(w/o enclosures)